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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1100

JACK BURDEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

JACK BURDEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Jack Burden, the petitioner herein, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on July 20, 1973.

A. OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is printed in Appendix A hereto at Page A-1. The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Northern District of Oklahoma are printed in Appendix B hereto at Page A-

B. JURISDICTION

The Judgment of the Court of Appeals was entered July 12, 1973. Petitioner's petition for rehearing was denied on December 3, 1973. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1). An Order Staying Mandate was issued on December 13, 1973, to and including January 12, 1974 pending the timely filing of a petition for writ of certiorari.

C. QUESTIONS PRESENTED FOR REVIEW

1. Is the conduct of a corporate officer "willful" under the provisions of Title 26 U.S.C. §6672 in not causing remittance of employment taxes when another company gains dominate control of the corporation and such officer is unable through circumstances beyond his control to pay the tax?

2. The decision of the Court of Appeals for the Tenth Circuit causes a corporate officer to become an "insuror" or "guarantor" and causes per se liable for the nonpayment of corporate employment taxes, contrary to statute.

3. The decision of the said Court of Appeals which affirmed the District Court judgment constitutes liability placed upon a corporate officer without sufficient showing in the record that the petitioner by any deliberate conscious effort caused the nonpayment of the taxes.

4. The decision of said Court of Appeals failed to consider that the government's own negligence substantially contributed to the nonpayment of these taxes and therefore, it should be barred from collection against petitioner.

5. The decision of said Court of Appeals would be in conflict with a decision of the Ninth Circuit.

D. STATUTES INVOLVES

Pertinent Federal Statute is Title 26, U.S.C., §6672 as follows: *Failure to collect and pay over tax, or attempt to evade or defeat tax.*

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable."

E. STATEMENT OF THE CASE

This tax refund suit arose out of the failure of CPM Constructors, Inc., an Oklahoma corporation (CPM), to remit and pay over the balance of its employment taxes for the first quarter of 1967 in the amount of $91,058.79 and for the second quarter of 1967 in the amount of $87,467.47. Thereafter, the Internal Revenue Service (IRS) made a penalty assessment against Jack S. Burden (Burden) as a responsible corporate officer in the amount of $157,267.27 pursuant to Title 26, U.S.C., §6672.

In May, 1966, CPM entered into two contracts to build and construct for Transwestern Pipeline Company of Houston, Texas, (Transwestern) three compressor stations and enlarge a fourth compressor station in the State of Arizona for a contract price of approximately 2.9 million dollars. Testimony reflected that the original price between CPM and Transwestern was based upon CPM performing the construction work *with nonunion labor*; and after the contracts were executed, Transwestern, for various reasons, required CPM to perform the contract with union labor. This change increased the cost of construction to CPM approximately 35 percent because of increased wages and fringe benefits to union labor, but no adjustment was made to the contract price. Shortly after construction started, CPM began to encounter financial difficulty due to the increased costs and construction delays. Regardless, all employment taxes for 1966 owed by CPM were properly withheld and paid.

As construction progressed, Transwestern made numerous design changes which necessitated 1,300 drawing revisions to the original anticipated job requirements and totaling 8,000 drawings, which in 150 instances required completed construction work to be torn out and redone. Transwestern was required under the contract to furnish various equipment and materials which, in most instances, were late in arriving. Due to these circumstances which caused expenses to substantially exceed income, Burden was made aware of the precarious financial position of CPM and terminated the President. Burden assumed executive control to salvage and complete the job and on February 21, 1967, he and two other CPM officials went to Houston, Texas and met with officials of Transwestern. Burden advised Transwestern that due to all of the construction difficulties, CPM could no longer financially continue the job and CPM was $300,000.00

behind in payment of bills. Transwestern was made aware at that time that sub-contractors and vendors were not being paid because CPM did not have the funds and the parent companies of CPM were unable to advance additional monies. Transwestern officials insisted CPM finish the project and agreed to provide necessary funds to assure completion. Transwestern agreed and did provide CPM with $188,132.47 for back overtime which was paid on March 6, 1967, of which $156,861.11 on the same date was used to pay first quarter 1967 employment taxes.

After the February meeting, CPM continued construction and Transwestern continued to make partial payments on completion of construction. In late March, two CPM officials met with the Transwestern project engineer, at Albuquerque, New Mexico, advising him that CPM was broke and could not even meet the payroll. Pursuant to this meeting, Transwestern commenced to advance funds for CPM to meet its net payroll, but did not include funds for withholding taxes. The Financial Vice-President of CPM testified he would secure the payroll figures from the field offices and relay the information by telephone to Transwestern in Houston, Texas. Transwestern advised CPM they were not interested in gross payroll figures but only in the net figures. Transwestern advanced net payroll funds totaling $184,900.00 in April of 1967, which did not include funds for employment taxes. By this time the bank had cut off loan funds, and CPM had no other money source, and it believed Transwestern would also pay the taxes.

CPM continued construction but on April 21, 1967, Transwestern terminated CPM from the job. CPM with-

drew its employees but its equipment was left for Transwestern to use to complete construction. Shortly after termination, the Controller of Transwestern came to Tulsa along with an accountant to examine the books of CPM and discuss the means and manner of wrapping up the financial details of the job, causing reasonable expectation of funds by Burden and other CPM officials. Transwestern officials examined the books and discussed with officials of CPM the possibilities of advancing monies to either CPM or its parent companies. The Transwestern officials viewed real estate and other assets of the parent companies of CPM for the purpose of making a financial determination. CPM officials and plaintiff had every reason to believe that Transwestern would live up to its committed obligation of seeing that all bills were paid.

On May 31, 1967, plaintiff and other officials of CPM went to Houston, Texas and for the first time were advised that Transwestern would pay certain bills, but not the unpaid employment taxes. In the meantime, CPM had depleted what funds it had in the payment of its notes to The First National Bank of Tulsa, which were pledged and secured by assignments of the contracts, and employment taxes in Arizona because they were a lien on the property, and some other miscellaneous bills. The last funds, $166,647.73 received in April, 1967 from Transwestern, were substantially committed by assignments and pledges over which plaintiff had no control. After April 27th, no disbursements were made to subcontractors. All funds paid thereafter were remitted directly to the creditors by Transwestern.

For the first quarter of 1967 (January, February and March), CPM filed its employer's quarterly federal tax return, Form 941, (Plaintiff's Exhibit 5A) declaring total employee taxes in the amount of $326,605.91 and payment of $235,547.12 with a balance due of $91,058.79. CPM filed its employer's quarterly federal tax return, Form 941, for the second quarter of 1967 (April, May and June) declaring total employment taxes due of $87,467.26 and payment of none. Pursuant to these delinquencies of $178,526.26 the IRS commenced an investigation in mid-1967. The agent was made knowledgeable of the financial dilemma and the efforts being made by the plaintiff and other officers of CPM to satisfy the employment taxes. On July 25, 1967, a statement of final account was submitted to Transwestern showing amounts due to CPM of $396,097.31, a copy of which was sent to the IRS by Burden. Transwestern paid directly to creditors of CPM the total amount of $359,311.91. After much delay, the IRS on November 2, 1967 served a notice of levy on Transwestern for any amounts due to satisfy the unpaid employment tax liability, and by that time all amounts due and owing to CPM had been paid by Transwestern from its own funds over which CPM and Burden had no control.

The petitioner submits that under the circumstances of this case when CPM negotiated the contract on a non-union basis and was later required by Transwestern to operate with union labor without an appropriate financial adjustment to the contract that, in effect, CPM became a "captive" corporation and agent of Transwestern. Also the insistence by Transwestern that CPM complete the project and the assurance of Transwestern that CPM would not go broke, caused CPM and petitioner to have

good reason to believe that all obligations would be satisfied. This is further manifested by the fact that Transwestern used the final amounts due under the contract to pay all creditors of CPM with the exception of the Internal Revenue Service and advances by the parent companies. By its actions Transwestern undertook the responsibility for the payment of these taxes, and further prohibited petitioner from making any choice as to who should be paid. Transwestern's conduct was obviously deliberate to keep CPM from having access to funds to pay the taxes.

The petitioner further submits that under the circumstances of this case, the conduct of plaintiff and other officers of CPM was not wilful, and with the assurances of Transwestern to complete the contracts, they did everything possible to keep the job going and pay all the bills, including taxes. Further, CPM officers furnished all creditor information, including taxes, to Transwestern who did, in fact, eventually pay all the creditors except the IRS and CPM's parent companies. Under the evidence of this case Transwestern ultimately controlled the financial status of CPM and Transwestern failed to make funds available for payment of taxes which demonstrates Burden had no control over these funds, which were far in excess of taxes due.

Furthermore, Burden's lack of willfulness is demonstrated by the evidence that the tax trouble existed before he got into the picture. When Burden took over, CPM could not meet the payroll except for assurances of Transwestern. Government did not show he was in charge of corporate tax affairs, and evidence reflected he only signed two checks and no tax returns. Most of their evidence of "responsibility" and "willfulness" is based upon generalized cross examination of petitioner.

The evidence reflected Transwestern paid CPM 3.6 million dollars for the job, but it cost CPM 4.3 million dollars.

F. REASONS FOR ALLOWANCE OF THE WRIT

This case demonstrates a classic example of holding a corporate officer liable where he took over an already financially distraught corporate operation. The record demonstrates Burden's actions were motivated by the completion of the project having been assured by Transwestern it would carry CPM through the dilemma.

Substantial bank loans were payed off, but that was becaused the proceeds from the contracts were assigned to the bank as security for the loans. In *Lowe* v. *United States*, 224 F. Supp. 569 (S.D. Tex. 1963) the Court found the officer not liable where the corporation's interest in contract proceeds were assigned to a bank as security. Here the Tenth Circuit Court of Appeals in the instant case ignored the fact that CPM had assigned contracts. To have diverted those funds for the payment of taxes would have constituted misapplication.

Another reason for granting the writ was because under the evidence in this record Transwestern had made assurance to carry CPM to completion of the job. In *Arnason et al* v. *United States*, 68-1 USTC ¶9419 (Dist. N. Dak. 1968) govt. appeal dis. C.A. 8, 69-1 USTC ¶9318, in absolving the officers of liability the Court in its conclusion of law states:

> "Evidence that the corporation was unable to pay the FICA taxes and withholding taxes because of lack of funds is evidence that the failure to pay was not 'willful' on the part of any responsible official."

> "Evidence that the taxpayers had a reasonable expectation of obtaining payment of the unpaid taxes from a given source is evidence that they did not willfully fail to pay such taxes. *** In this case the taxpayers had a reasonable expectation that said taxes would be paid with the orderly liquidation of the Arnason & Meyer Construction Co."

Here Burden had every reasonable expectation that Transwestern would pay all of CPM's bills, in that all were paid except the employment taxes and parent company advances. Transwestern by paying the last 359 thousand dollars voluntarily and deliberately preferred the creditors, not Burden or CPM.

When Burden took charge of the Company in mid-February of 1967, it was already behind in payment of the bills. Transwestern agreed to advance CPM $188,000 of which $156,000 was applied to back tax payments. This was early evidence of good faith on the part of Burden. The conduct of Transwestern of advancing only "net" payroll funds reflected that Transwestern actually controlled the financial affairs of CPM. This evidence is undisputed in the record. Where another company maintains dominant control over the tax payer corporation, the taxpayer's officers are not responsible for failure to pay over employment taxes. In *Pacific National Ins. Co.* v. *United States*, 422 F.2d 26 (9 Cir. 1970) cert. den. 398 U.S. 937, 26 L. Ed. 2d 269, a surety company which exercised complete control over disbursement of a contractor's funds was held liable as the "person" responsible to collect and pay over the employment taxes. *Peterson* v. *Fidelity & Deposit Co.*, 330 F. Supp. 424 (D.C. 1971)

Transwestern knew CPM would not have sufficient funds to meet its tax responsibility and thereby jeopardized itself by making such advances, although no assessment was made against Transwestern. See Title 26 U.S.C. §3505. In addition Transwestern directly disbursed $359,000 of money due to CPM to creditors of CPM thereby paying all bills except the tax bill and monies owed to the parent companies of CPM. This was a clear example of funds over which Burden or CPM had no control thereby defeating their opportunity to pay the balance of taxes due.

Another reason to grant the writ is to consider the unique feature of the failure of the government to file a timely notice of levy against Transwestern for amounts due CPM. The IRS became aware of CPM's non-payment of taxes in the Spring of 1967 and was forwarded a copy of CPM's statement of final accounts to TPC dated July 25, 1967. A timely Notice of Levy by the IRS would have protected the taxes. Instead IRS filed a Notice of Levy on Transwestern dated October 25, 1967 and served November 2, 1967. By this time Transwestern had paid creditors of CPM $359,000 and presumably owed CPM nothing more.

In the usual course of business IRS will immediately serve Notices of Levy on all accounts receivable of a delinquent employment tax debtor. The fact they waited over 90 days in this case was the proximate cause of these monies owed CPM being paid to others; further compounded by the fact that Transwestern knew CPM was delinquent in payment of these taxes and the record reflects Transwestern told Burden in May 1967 it would not pay the taxes.

Another reason to consider the granting of the writ is the fact that the results of this case are in contradiction to the dictum as stated in *Dudley* v. *United States*, 428 F.2d 1196 (9 Cir. 1970) which on page 1210 in discussing 26 U.S.C. §6672 that:

> "The purpose of the section is not served by imposing liability upon a corporate officer who had neither actual nor constructive knowledge of the non-payment of tax until such time as he was unable through circumstances beyond his control, to pay the tax."

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM - 1973

JACK S. BURDEN,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 72-1844

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 71-C-226)

Jack S. Burden appeals from a judgment denying his claim for refund of employee withholding taxes in the amount of $310.99 which he paid following a Government penalty assessment and the Court's judgment allowing

the Government's counterclaim for $156,016.28. The Court found that Burden was a responsible officer of CPM Contractors, Inc., (CPM), charged with a duty to remit withholding and social security taxes withheld from employees for the first and second quarters of 1967, and that he willfully failed to pay them in violation of 26 U.S.C.A. §6672. [1/] Jurisdiction in this court rests on 28 U.S.C.A. §1291.

CPM, an Oklahoma corporation, was formed in 1965 to carry on non-union construction work as a subsidiary of Universal Engineers and Constructors; Universal is principally owned by the O. R. Burden Construction Corporation. CPM entered into two construction contracts with Transwestern Pipeline Company of Texas (TPC) in 1966 to construct three compressor stations and to enlarge a fourth station in Arizona. Burden was Chairman of CPM's Board of Directors when the work began on the contracts with TPC. He was also President and Chairman of the Board of Directors of O.R. Burden Construction Corporation, and Chairman of the Board of Directors of Universal Engineers and Constructors.

CPM submitted its bid to TPC on a non-union basis. Later TPC persuaded CPM to operate with union labor without any adjustment in the contract price. Problems developed with respect to the performance under the

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1. Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

contracts with TPC including labor union troubles with employees, erroneous and incorrect engineering and designing by TPC and numerous revisions of drawings by TPC. CPM began experiencing financial difficulties in November of 1966. CPM's president was terminated on March 8, 1967, at which time Burden assumed those duties. Prior to that time Burden met with TPC officials. TPC paid CPM $188,000 on March 6, 1967, as compensation for overtime wages. TPC also paid CPM $2,541,013.75 for work on the compressor stations. In addition, O. R. Burden Construction advanced CPM $200,000. CPM used these monies to meet net payroll expenses, to pay subcontractors and material suppliers, and to pay off a bank loan.

On April 21, 1967, TPC relieved CPM from performance under the contracts. TPC owed CPM about $400,000 and paid about $359,000 directly to CPM's creditors. CPM failed to pay employment taxes to the IRS for the first and second quarters of 1967.

Burden alleges that: (1) his actions were not "willful" under Section 6672; (2) CPM became the agent of TPC; (3) he lost control over the funds of CPM to TPC; and (4) under these circumstances he was unable to pay the subject taxes. Once TPC started paying CPM's bills, Burden argues that it was reasonable for him to assume that it would also pay the subject taxes. He also asserts that all job proceeds from TPC were assigned to the bank as security for its loans.

There is no argument that under Section 6672 Burden was a "person" under the duty to collect and pay the taxes withheld on the wages of CPM's employees. The issue is whether he "willfully" failed to discharge this duty.

We review the evidence in the light most favorable to the Government and we will not overturn the findings of the District Court unless they are clearly erroneous. House Beautiful Homes, Inc. v. Commissioner of Internal Revenue, 405 F.2d 61 (10th Cir. 1968); Coffey v. United States, 333 F.2d 945 (10th Cir. 1964).

"Willfully" as used in Section 6672, *supra*, means a voluntary, conscious and intentional decision to prefer other creditors over the Government. Newsome v. United States, 431 F.2d 742 (5th Cir. 1970); Pacific National Insurance Company v. United States, 422 F.2d 26 (9th Cir. 1970), cert. denied 398 U.S. 937 (1970); Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970); Dillard v. Patterson, 326 F.2d 302 (5th Cir. 1963). It does not require bad motive as in a criminal case. The "person" required to collect and pay over withholding and social security taxes imposed upon the wages of employees is their employer. 26 U.S.C.A. §§3101, 3102, 3402, 3403. 26 U.S.C.A. §6671(b) defines "person" as used in §6672, *supra*, as *an officer of a corporation whose function it is to perform the acts in respect to which the violation occurs.* Burden was fully aware of CPM's financial difficulties and defaulted tax obligations. Notwithstanding, he chose to prefer and pay creditors other than the Government. Burden's argument that TPC controlled CPM's funds does not render him less "willful"; TPC did not agree to pay the taxes, and Burden disbursed over $2,000,000 to various creditors other than the Government after he knew that CPM's employees' taxes had not been remitted to the United States.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. Civ. 71-C-226

JACK S. BURDEN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Statement

This case involves a question relative to penalty taxes under the provisions of 26 U.S.C. §6672 and the collection and payment of such taxes.

CPM Constructors, Inc., an Oklahoma corporation, entered into written contracts with Transwestern Pipeline Company of Houston, Texas, to construct three compressor stations and do other work for said company. These contracts involved large sums of money. The plaintiff, Jack S. Burden, was the president of CPM Constructors, Inc. and brought this action contending that the United States has illegally and erroneously assessed

and collected from him penalty taxes under the provisions of 26 U.S.C. §6672; that he did not willfully fail to collect such tax or truthfully account therefor and to pay over such tax, or willfully attempt in any manner to evade or defeat such tax or the payment thereof, but contends that due to financial circumstances of the CPM Constructors, Inc. monies were not available for the payment thereof, but contends that due to financial circumstances of the CPM Constructors, Inc. monies were not available for the payment of such taxes, and therefore, plaintiff did not willfully act in failing to pay over or account for such taxes.

The defendant contends that plaintiff was a responsible officer of CPM Constructors, Inc., charged with the duty to remit to the government taxes withheld from the wages of the corporation's employees, and his failure in this regard was willful.

The United States of America answered admitting the assessments and denying any illegality in such assessments and filed a counterclaim against the plaintiff for the sum of $156,016.28.

A trial and hearing was held in Tulsa, Oklahoma, on the 13th day of January, 1972, at which time evidence was submitted by the parties, and upon due consideration of the evidence submitted, the exhibits, stipulations and the enire file in this cause, the Court does enter the following:

Findings of Fact

1. Plaintiff was timely assessed the tax which is the subject of his Complaint and the defendant's counterclaim

herein in the amount of $157,267.27, and notice and demand for payment of that tax was made upon plaintiff on May 29, 1970.

2. The plaintiff paid $310.99 toward this assessment on September 1, 1970.

3. On April 15, 1971, the Commissioner of Internal Revenue applied a credit of $940.00 from the plaintiff's 1970 Federal Income Tax toward the assessment.

4. As of February 15, 1972, the plaintiff has failed to pay $156,016.28 of the assessed tax.

5. On September, 1970, plaintiff filed timely claims for refund. Plaintiff's claims for refund were disallowed by letter dated November 9, 1970, from the Internal Revenue Service.

6. Plaintiff is a resident of Tulsa County, State of Oklahoma within the Northern Judicial District of Oklahoma and has timely filed this action for recovery of the penalty taxes assessed and collected under the provisions of 26 U.S.C. §6672 and further jurisdiction is conferred upon this Court by 28 U.S.C. §1346(a) (1).

7. During the period that withheld taxes were not remitted to the government, plaintiff was president and chief executive officer, and was chairman of the board of directors of CPM Constructors, Inc. (referred to herein as CPM).

8. The plaintiff in this case was the ultimate decision maker for CPM and had the power to override any decisions made by CPM's other officers.

9. CPM was engaged in the process of building for Transwestern Pipeline Company certain compressor stations and an addition to an existing station. A multitude

of problems developed with respect to this project which was the only project ever undertaken by CPM. The problems included labor union trouble, erroneous and incorrect engineering and designing on the part of Transwestern and numerous revisions of drawings and field changes, and many arguments and disagreements with Transwestern personnel resulted, and in general brought about a slow-down of the work.

10. During the first quarter of 1967, CPM's financial picture became extremely critical. Plaintiff became aware sometime in February of 1967, that CPM was in deep difficulty in paying its obligations to vendors and suppliers and to subcontractors, and that CPM was having difficulty in allocating funds for withholding taxes. During January and March, 1967, CPM remitted to the government over $200,000.00 in withheld taxes. Transwestern was not involved in the decision to remit the portion of the withheld taxes that was actually remitted during the first quarter of 1967. No one from Transwestern ever prevented plaintiff from remitting withheld taxes, or prevailed upon it to do so.

11. Toward the end of the first quarter of 1967, CPM began to cease remitting its withheld taxes. None of the income taxes and social security taxes withheld by CPM during the second quarter of 1967 was ever remitted to the Internal Revenue Service. The total amount of Taxes withheld from the employees of CPM during the first and second quarters of 1967, which was never remitted to the Internal Revenue Service, amounted to $157,267.27. Plaintiff knew that withheld taxes should be remitted to the Internal Revenue Service as the law required.

12. Plaintiff assumed that Transwestern would ultimately pay these withheld taxes to the Internal Revenue

Service, and Transwestern officials indicated that Transwestern would pay the withheld taxes, but plaintiff never received a firm committment from Transwestern that it would satisfy or pay this liability.

13. Plaintiff felt that CPM had to make its payrolls through any method or means so that the job could be completed and that the withheld taxes could ultimately be paid. Plaintiff felt that if the job could be completed, the taxes and debts could be paid and they might even make a few thousand dollars profit.

14. After plaintiff acquired knowledge in February, 1967, that CPM was beginning to cease remitting the government tax monies that CPM was withholding from its employees' paychecks, plaintiff allowed CPM to disburse over $2,000,000 of CPM's money, for other creditors, bills, net wages and expenses.

15. During the first two quarters of 1967, CPM's cash receipts totaled over $4,000,000 and all of this money was disbursed by CPM. During each of the months of January, February and March, 1967, CPM received over $400,000 as proceeds of bank loans.

Conclusions of Law

1. This court has jurisdiction of the parties and subject matter of this action.

2. Plaintiff was the responsible officer of CPM charged with a duty to remit to the government taxes withheld from the wages of the corporation's employees. Plaintiff's status as responsible officer is shown by the facts that he was president, chief executive officer and chairman of the board of CPM, and by the fact that plaintiff was the ultimate decision maker in CPM, having

the power to override decisions of the other officers. See *Newsome* v. *United States*, 431 F.2d 742 (C.A. 5 1970); *Monday* v. *United States*, 421 F.2d 1210 (C.A. 7, 1970); *Bloom* v. *United States*, 272 F.2d 215 (C.A. 9 1959), cert. den. 363 U.S. 803 (1960).

3. Plaintiff's failure to see to it that the taxes withheld from the employees' wages were remitted to the government was willful, in that after plaintiff acquired knowledge in February, 1967, that CPM was in severe financial difficulties and was beginning to cease remitting withheld taxes to the government, plaintiff thereafter continued to allow the corporate funds to be disbursed for net wages and other bills and expenses of CPM. After plaintiff acquired knowledge of CPM's withholding tax delinquency in February, 1967, he allowed sums in excess of the withheld taxes to be disbursed to others, leaving the withholding taxes unpaid. Such a preference constitutes willfulness as that term is used in Section 6672 of the Internal Revenue Code of 1954. See cases cited above.

4. Plaintiff's choosing to pay the essential operating expenses to keep the project going so that ultimately all of the bills and taxes might be paid constitutes willfulness under Section 6672 of the Internal Revenue Code of 1954. See *Newsome* v. *United States*, supra.

5. That the responsible person may have believed that the government would collect the withheld taxes from some other source does not insulate him from liability. The withheld taxes constitue a trust fund, and the government is entitled to rely upon the responsible officers of the corporation for payment, and need not take affirmative action to collect such withheld taxes. *Cash* v. *Campbell*, 346 F.2d 670 (C.A. 5, 1965).

6. The actions or intimations of Transwestern Pipeline Company do not excuse plaintiff's willful failure to see that the taxes were remitted. Where a general contractor supplies only net wages to a subcontractor who disburses the net wages and does not remit the withheld taxes to the government, the responsible officer is liable under Section 6672 if he has allowed corporate funds to be disbursed for net wages or other bills or expenses after he acquired knowledge of the accrued withholding taxes.

7. Neither the demands of creditors nor the poor financial condition of the business will excuse a responsible officer's willful failure to remit withheld taxes.

8. Plaintiff is not entitled to any refund, and the defendant United States of America is entitled to judgment on its counterclaim against the plaintiff, together with interest thereon as provided by law.

Dated this 14th day of July, 1972.

/s/ Luther Bohannon
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 71-C-226

JACK S. BURDEN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law this day filed, it is

THE JUDGMENT OF THE COURT that the plaintiff take nothing upon its Complaint in this case.

IT IS THE FURTHER ORDER AND JUDGMENT OF THIS COURT that the defendant, United States of America, have judgment against the plaintiff upon its counterclaim in the sum of $156,016.28 together with interest at the rate of six percent (6%) per annum to the date of this Judgment, and thereafter at the rate of ten percent (10%) per annum until paid.

IT IS THE FURTHER JUDGMENT OF THE COURT that the defendant, United States of America, have judgment for its costs herein expended.

Dated this 14th day of July, 1972.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

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No. 73-1100

FILED
MAR 13 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

JACK S. BURDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1100

JACK S. BURDEN, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the factual question, decided adversely to him by both courts below, whether he "willfully" failed to collect and pay over withholding and social security taxes owed by a corporation of which he was an officer. As a result, he was held personally liable for a penalty equal to the total amount of tax not paid over under Section 6672 of the Internal Revenue Code of 1954.[1]

1. The circumstances of petitioner's failure to pay over the employment taxes owed by the corporation were as follows: The corporation, CPM Constructors, Inc.

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[1]Petitioner has abandoned the argument made below that he was not the officer of the corporation vested with the responsibility of disbursing funds to meet the corporation's obligations.

("CPM"), entered into two construction contracts with Transwestern Pipeline Company of Texas ("Transwestern") in 1966. During the first two quarters (January-June) of 1967, CPM had financial difficulties in performing these contracts, which resulted in its failure to pay withholding taxes of $157,267.27 for these two quarters. As the construction progressed, CPM received more than $2.5 million in payments from Transwestern under the contracts and $200,000 from a company of which petitioner was president. CPM used these funds to meet net payroll expenses, to pay subcontractors and material suppliers, and to pay off a bank loan (Pet. App. A2-A3, B2-B5).

Petitioner had previously been the principal officer of a parent corporation of CPM and had served as chairman of CPM's board of directors. In January 1967, however, he assumed the active management of CPM and shortly thereafter became its president and chief executive officer. He became aware some time in February 1967, that CPM was having difficulty in setting aside sufficient funds for withholding taxes of its employees. He knew that taxes had to be withheld and remitted to the United States, but assumed that Transwestern would ultimately pay the taxes since it had indicated that it would meet CPM's obligations. Transwestern did not, however, make a firm commitment to pay the taxes and did not supervise petitioner's disbursement of more than $2,000,000 of CPM's funds to other creditors after petitioner became aware that CPM had ceased remitting the taxes to the government (Pet. App. A2, B4-B6).

2. The question whether a person has "willfully" failed to pay over taxes withheld from employees' salaries within the meaning of Section 6672 is es-

sentially a factual issue which must be resolved by consideration of all surrounding circumstances. See, *e.g., United States* v. *Leuschner,* 336 F. 2d 246 (C.A. 9). As used in Section 6672, the term "willfully" does not connote a criminal intent or other bad motive on the part of the responsible person. A voluntary, conscious and intentional decision to prefer other creditors over the United States is sufficient to invoke the penalty provisions of the statute. *Newsome* v. *United States,* 431 F. 2d 742 (C.A. 5); *Monday* v. *United States,* 421 F. 2d 1210 (C.A. 7), certiorari denied, 400 U.S. 821; *Dillard* v. *Patterson,* 326 F. 2d 302 (C.A. 5). Since it is undisputed that petitioner deliberately preferred other creditors over the United States after he became aware that CPM had ceased remitting the withheld taxes, there was ample evidence to support the finding of willfulness.

Petitioner attempts (Pet. 9-11) to excuse his willful failure to pay over the taxes by relying upon Transwestern's alleged control of CPM's disbursements and his alleged expectation that Transwestern would meet all of CPM's obligations. This argument, rejected by both courts below, has no factual foundation in the record. Indeed, the district court found that Transwestern did not supervise petitioner's distribution of more than $2,000,000 of CPM's funds after petitioner became aware of the tax deficiencies, and that petitioner did not receive a firm commitment that Transwestern would satisfy the tax liability (Pet. App. B4-B5).

Moreover, even assuming that Transwestern may have been liable for the taxes through a contractual arrangement with CPM, petitioner cannot avoid liability under Section 6672 simply by demonstrating the

existence of another person's duty to withhold and pay over the same taxes. *Monday* v. *United States, supra; Braden* v. *United States,* 442 F. 2d 342 (C.A. 6), certiorari denied *sub nom. Bonistall* v. *Braden,* 404 U.S. 912; *Pacific National Insurance* v. *United States,* 422 F. 2d 26 (C.A. 9), certiorari denied, 398 U.S. 937; *Cash* v. *Campbell,* 346 F. 2d 670 (C.A. 5).[2]

Petitioner further argues (Pet. 11) that his liability under Section 6672 is excused by the government's election not to seek payment of the taxes through timely levy against Transwestern for amounts due CPM under the contracts. But the government was not required to look to Transwestern for payment of the taxes. Petitioner's mere assumption that the government would collect the deficiencies from

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[2]Petitioner's suggestion (Pet. 11) that Section 3505 may be applicable to this case is unsupported by the record and is, in all events, irrelevant. That provision, added to the Code by Section 105(a) of the Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125, imposes a liability for the payment of withholding taxes upon a lender who supplies funds to an employer which are used for the payment of payroll obligations. Section 3505(b) provides that if the lender is aware that the funds are to be used for payroll and has actual notice or knowledge that the employer does not intend, or is unable, to pay the withholding taxes, then the lender is liable for the taxes in an amount not to exceed 25 percent of the amount advanced. There is no showing in this case that Transwestern had such knowledge to make Section 3505(b) applicable. But even assuming that it did have the requisite knowledge, the legislative history of the statute states that the lender's liability under these circumstances is simply an alternative statutory remedy available to the government in addition to the responsible officer's liability under Section 6672. See H. Rep. No. 1884, 89th Cong., 2d Sess., p. 21; S. Rep. No. 1708, 89th Cong., 2d Sess., pp. 22-23.

Transwestern did not justify his failure to remit the taxes in issue. *Cash* v. *Campbell, supra.*[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[3]As petitioner recognizes, the statement he quotes (Pet. 12) from *Dudley* v. *United States*, 428 F. 2d 1196 (C.A. 9) is dictum. In *Dudley*, the person responsible for paying over the withheld taxes did not become aware that the funds had not been remitted to the government until after he had lost control over corporate affairs. Here, on the other hand, petitioner supervised the distribution of more than $2,000,000 to various creditors other than the government, after he knew that the withheld taxes of CPM's employees had not been remitted.

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